APPELLATE TRIBUNAL UNDER SAFEMA AT NEW DELHI

MP-PMLA-7676/AHD/2020
MP-PMLA-7677/AHD/2020
FPA – PMLA – 3754 / AHD / 2020
State Bank of India Appellant

MP-PMLA-7698/AHD/2020
FPA – PMLA – 3758 / AHD / 2020
Indian Bank Appellant

MP-PMLA-7745/AHD/2020
MP-PMLA-7574/AHD/2020
FPA – PMLA – 3721 / AHD / 2020
Smt. Hemangi Samir Kakkad Appellant

MP-PMLA-7575/AHD/2020
FPA – PMLA – 3722 / AHD / 2020
Sh. BhupenDalsurkhraiSavani Appellant

FPA – PMLA – 3733 / AHD / 2020
M/s SujyotInfrastructure Pvt. Ltd. Appellant

MP-PMLA-7780/AHD/2020
MP-PMLA-7781/AHD/2020
FPA – PMLA – 3771 / AHD / 2020
Sh. Sunil Surendra Kumar Kakkad Appellant

Versus

The Deputy Director,
Directorate of Enforcement, Ahmedabad Respondents

Advocates / Authorized Representatives who appeared

For the Appellant(s) **:** Mr. Ankur Mittal, Advocate
Mr. Abhay Gupta, Advocate
Ms. PreetiChoudhary, Advocate
Mr. Ashish Rana, Advocate
Mr. Arurag Kumar Singh, Advocate
Mr. Jatin Kumar Gaur, Advocate

For the Respondent(s) **:** Mr. Ankit Talsaniq, Advocate
Mr. AbhimanKaul, Advocate

CORAM

JUSTICE MUNISHWAR NATH BHANDARI : CHAIRMAN
SHRI RAJESH MALHOTRA : MEMBER

ORDER
06.03.2025

By batch of these appeals, a challenge has been made to the order dated 27.07.2020 passed by the Adjudicating Authority to confirm the attachment order dated 08.11.2019. Ten immovable properties valued at Rs.56,21,96,816/- were provisionally attached.

The challenge to the attachment has been made not only by the persons whose properties have been attached but even by the financial institutions to whom the said properties alleged to have been mortgaged. Ten properties involved in the attachment belong to M/s SaiInfosystem(I) Ltd.; M/s Atrium Infocomm Pvt. Ltd.;M/s Sujyot Infrastructure Pvt. Ltd.; Shri BhupenDalsukhraiSavani; Smt. Sarangi BhupenSavani. The property seems to have been mortgaged to State Bank of India (SBI) and Indian Bank and accordingly appeals have been preferred by the financial institutions apart from Smt. Hemangi Samir Kakkad, Shri BhupenDalsukhraiSavani,Smt. Sarangi BhupenSavani;and M/s Sujyot Infrastructure Pvt. Ltd. through Shri Sunil S. Kakkad.

The properties were attached by the provisional attachment order dated 08.11.2019 after registration of FIR on 04.08.2016 by the Central Bureau of Investigation, Banking

Security & Fraud Cell (CBI, BS&FC), Mumbai on a written complaint of Shri ShekharTripathi, Deputy General Manager & Regional Head, Bank of Baroda, Ahmedabad, City Region, Ahmedabad and ECIR against M/s SaiInfosystem (I) Ltd. and Shri Sunil S. Kakkad being the Director of the Company and other unknown directors. It was also against the officers of Bank of Baroda for the offence under section 120B read with Section 420 of IPC and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988.

It was alleged in the FIR that M/s SaiInfosystem (I) Ltd. represented by Shri Sunil S Kakkad has entered into a conspiracy with the public servants of Bank of Baroda and accordingly availed various credit facilities from the Bank of Baroda based on false and inflated stocks and receivables statements. The LCs were opened on related companies which then got dissolved and the accused fraudulently and dishonestly siphoned off the funds and thereby caused wrongful loss to Bank of Baroda to the tune of Rs.104.78 crores.

An FIR was earlier registered on 03.08.2016 against the Company and othersfor cheating Allahabad Bank to the tune of Rs.51.62 crores.

An FIR was registered even on 07.06.2016 by CBI Mumbai against the appellant Company and other person for the same offences. It is for causing wrongful loss to the Corporation Bank to the tune of Rs.109 crores by cheating.

The FIR was registered even on 28.06.2016 by the Deputy General Manager, State Bank of Bikaner and Jaipur, Corporate Banking, Mumbai containing the same allegation for causing wrongful loss of Rs. 56.14 crores to the State Bank of Bikaner and Jaipur.

The FIR dated 16.05.2016 was registered by CBI Mumbai at the instance of State Bank of India for the same offence and for wrongful loss of Rs. 377.90 crores.

It was revealed that M/s SaiInfosystem (I) Ltd. had approached the consortium of banks led by State Bank of India to avail credit facilities like cash credit and term loans from banks. It was to increase the drawing powers by giving false details of the debtors and stock statements. In fact,the FIRswere registered even at Ahmedabad alleging cheating and breach of trust by the Company in reference to different funds borrowed by them.

The facts on record shows that an FIR was registered by CBI Mumbai even against M/s Click Telecom Pvt. Ltd., Shri Sunil S. Kakkad and many others on 16.03.2015 for the offence under Section 120B, 420 apart from other offence under IPC and the offence under Prevention of Corruption Act of 1988. It was for causing wrongful loss to the extent of Rs. 74.16 crores to the Banks. In fact, series of FIRs have been registered by the different financial institutions.

Based on the FIRs, the respondent recorded the ECIR and during the course of the investigations, statement of many persons wererecorded under Section 50 of the Prevention of Money Laundering Act, 2002 (in short "**the Act of 2002**"). The main accused, Shri Sunil S Kakkad was summoned on different dates but he did not appear initially but finally in the month of September, 2019 his statements were recorded.

These appeals were argued mainlyby the Counsel appeared for the State Bank of India. The properties belonging to M/s SaiInfosystem (I) Ltd. and M/s Atrium Infocomm Pvt. Ltd. were mortgaged to the appellant Bank. The financial institutions initiated the action under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short "**Securitization Act of 2002**"). The matter remained

pending before the Debts Recovery Tribunal (DRT), Ahmedabad, Gujarat though the appellant State Bank of India said to have taken the possession of the properties. It is further submitted that aResolution Plan was passed by the National Company Law Tribunal (NCLT), Ahmedabad vide order dated 22.08.2019 and another order dated 05.12.2019. The attachment of the propertiestook place on 18.11.2019.

So far as another financial institution i.e. Indian Bank is concerned, the properties were hypothecated by M/s SaiInfosystem (I) Ltd. under the control of Shri Sunil S. Kakkad. The loan amount was not repaid, thus action was initiated under the Securitization Act of 2002 by invoking section 13(2) of the said Act. The properties of the company were, however, attached.

The Counsel appeared for other respondents submitted that the Company has gone in liquidation thus the attachment should now be subject to outcome of the order of the NCLT and otherwise challenge to the order of attachment and its confirmation has been made even by the financial institutions, thus no separate argument is required. In the light of the aforesaid, we would refer to the leading arguments raised by the Counsel for the State Bank of India.

The Ld. Counsel appeared for the State Bank of India submitted that CIRP commenced against M/s SaiInfosystem (I) Ltd. on 30.11.2017 and from the commencement of CIRP, moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 (in short "**IBC**") took place. In the similar manner,CIRP commencedagainst M/s Atrium Infocomm Pvt. Ltd. vide order dated 10.07.2019 and on the same day, moratorium was declared. During the period of moratorium, the respondent attached 37 immovable properties. The impugned attachment was not permissible in the light of Section 14 of IBC. The provisional attachment order was yet passed in violation of Section 14 of IBC.

The other arguments raised by the Counsel for the appellant- SBI was in reference to Section 32A of IBC which was brought through an ordinance dated 28.12.2019 in the Act of 2016and is applicable retrospectively. Section 32A provides for ceasure of the liability of corporate debtor and the offence committed prior to the commencement of corporate insolvency resolution process. The provisional attachment was made subsequent to CIRP and initiation of proceedings under the IBC in reference to the offence committed prior to commencement of those proceedings. The Counsel for the appellant made reference to the order of the NCLT and also the apex Court to substantiate his arguments.

It was further argued by the appellant that the properties involved in the mortgage are untainted and not involved in the commission of offence, thus could not have been considered to be the proceeds of crime. The intention and object of the Act of 2002 is to deprive the offender from enjoyment of illegally acquired funds out of the crime and not to deprive the innocent person. The mortgaged property does not fall in definition of "proceeds of crime" under section 2(1)(u) of the Act of 2002. The properties were attached solely on the ground that Shri Sunil K Kakkad, who was the past Director of the companies had siphoned off the funds and invested the money into immovable properties in the name of Companies. It is, however, a fact that mortgaged properties were purchased much prior to commission of crime. Thus, there were no nexus between the crime and the properties mortgaged to the financial institutions. The period of alleged crime is from the year 2009 to 2013 while the properties mortgaged to the appellant- SBI and other institutions is prior to the date aforesaid. Thus, it could not have been attached by the respondent.

The fourth argument raised by the Counsel for the appellant was in reference to the definition of "proceeds of crime". It was to emphasize that the definition aforesaid covers the property acquired or derived directly or indirectly by

any person out of the scheduled offence. It does not permit any property to fall under the definition of "proceeds of crime". However, using the phraseology given in the definition i.e. "*thevalue of any such prope*rty", the properties acquired prior to commission of crime have been attached. In fact, there has to be nexus between the "property" and "commission of crime".

The Ld. Counsel for the appellant further urged that the proceedings under SARFAESI take precedence over the PMLA proceedings in the light of amendment in Enforcement of Security Interest and Recovery of Debts Laws and Misc. Provisions (Amendment) Act 2016 given effect since 01.09.2016. The appellant's financial institution had initiated the action for recovery under the Securitization Act of 2002 which could not have been effected by the order of attachment.

The last argument raised by the appellant was that the attachment of the properties have been made on mere assumption. The competent authority failed to realize that the property mortgaged to Bank to secure credit facilities could not have been subject to the attachment. In the light of the arguments aforesaid, prayer was made to set aside the impugned order.

The Counsel appeared for the Indian Bank has adopted the arguments raised by the Counsel for the State Bank of India.

The Counsel appeared for Smt. Hemangi Samir Kakkad, Shri BhupenDalsukhraiSavani,M/s Sujyot Infrastructure Pvt. Ltd. and Shri Sunil S. Kakkad adopted the arguments raised by the Counsel for the State Bank of India with only addition that in the light of initiation of proceedings under the IBC, the attachment of the properties became illegal. The only prayer was made that if interference in the impugned order is not made, any observation should not be carried in the criminal trial pending against the accused.

The appeals were vehemently contested by the Counsel for the respondents on all the grounds raised by the appellant. The elaborate arguments on each issue were made and would be referred while recording finding on each issue raised by the appellant. It is to avoid unnecessary repetition of one and same facts to make a bulky order. In view of above, we would be referring the arguments of the respondents while dealing with each issue raised by the appellant.

We have considered the rival submissions made by the parties and scanned the record carefully. It is a case where multiple FIRs were registered by the financial institutions from

time to time for the offence under Section 120-B read with Section 420 of IPC and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988. It was alleged that M/s SaiInfosystem (I) Ltd. represented by Mr. Sunil S. Kakkad entered into a conspiracy with the public servants of financial institutions and availed various credit facilities from the Bank of Baroda based on false and inflated stocks and receivable statements. The LCs were opened on related companies which then got dissolved and the accused fraudulently and dishonestly siphoned off the funds and thereby caused wrongful loss to the Bank of Baroda to the tune of Rs. 104.78 crores. An FIR was registered even by the Allahabad Bank containing the similar allegations for the loss of Rs. 51.62 crores.

The Corporate Bank also lodged an FIR with CBI, Mumbai alleging an offence of Section 120-B read with Section 420 IPC where an amount of Rs. 109 croreis involved. A similar FIR was lodged even by the State Bank of Bikaner and Jaipur in the yearof 2016 itself for wrongful loss to tune of Rs. 56.14 crores. The FIR was lodged even by the appellant's – State Bank of India for wrongful loss to them to the tune of Rs. 377.90 crores.

It is a case where M/s SaiInfosystem (I) Ltd. had approached the consortium of banks led by State Bank of India to avail credit facilities. The credit facility was then increased to allow enhanced drawing powers. It was based on false details of the debtors and stock statements.

FIR was registered even against M/s Click Telecom Pvt. Ltd. in the year 2015 wherein also Shri Sunil S. Kakkad was found involved for commission of similar offence involving Rs. 74.16 crores to the Banks.

The appeals were mainly contested by the Counsel appearing for the financial institutions on the ground that attached properties are under mortgaged to the appellant's bank which initiated action under section 13(2) of the Securitization Act of 2002. It remained pending and meanwhile company went under Resolution Plan pursuant to the orders of NCLT, Ahmedabad vide order dated 22.08.2019 and 05.12.2019. The attachment of 10 properties involved in this case was made on 18.11.2019.

The Ld. Counsel for the appellant submitted that since CIRP commenced against M/s SaiInfosystem (I) Ltd. on 30.11.2017, the proceedings for attachment of properties could not have commenced in view of the moratorium under Section 14 of IBC 2016.It is, further, submitted that even CIRP

commenced against M/s Atrium Infocomm Pvt. Ltd. vide order dated 10.07.2019 and on the same day moratorium was declared under section 14 of the IBC 2016. According to the appellant, once moratorium is declared, attachment is not permissible.

We have considered the submissions made by the Counsel for the appellant and to appreciate the argument, section 14 of IBC 2016is quoted hereunder:-

> *"(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-*
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> *(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
>
> *(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
>
> *(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*
>
> *(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*
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> *Explanation.--For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current*

dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified;

(3) The provisions of sub-section (1) shall not apply to-

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

The provision quoted above does not bar attachment of the property under the Act of 2002. We are not required to go deep on the issue because it has been settled by the Delhi High Court in the case of ***Rajiv Chakraborty Resolution Professional of EIEL Vs. Directorate of***

EnforcementreportedMANU/DE/4428/2022where it was held that moratorium under section 14 of IBC 2016 does not bar proceeding of attachment under the Act of 2002. Accordingly, the issue raised by the appellant cannot be accepted. However and for ready reference the relevant paras of the judgment **(supra)** are quoted hereunder:-

> *"73. The moratorium provision incorporated in the IBC is fundamentally aimed at maximisation of value, preservation of the assets of the debtor while possibilities of its resurrection are explored and ensuring that its various creditors do not initiate individual actions which may hamper or impede the resolution process. It is essentially aimed at preserving the insolvency estate and the suspension of actions against the debtor. The moratorium order staves off actions that may be initiated for enforcing security interests, claims by individual creditors, a restraint against the dissipation of its assets while the process of its restructuring is explored. It essentially seeks to sequester the assets of the debtor from actions which may be initiated by its creditors. It is during this crucial period that the viability of the debtor is assessed during the CIRP.*
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> *xx xx xx xx xx xx xx xx xx xx xx*
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> *80. As would be evident from the aforesaid discussion, the primordial purpose of a moratorium as enunciated hereinabove, is clearly distinct from the purpose and objectives of attachment action taken under the PMLA. PMLA is not concerned with the recovery or enforcement of a debt. Proceedings for attachment that may be initiated in terms thereof cannot by any stretch of imagination be viewed as being akin to an action for enforcement or recovery of a debt. PMLA is guided by the legislative policy of confiscation of proceeds of crime. That legislation is aimed primarily at fighting the scourge of organised crime, the generation and retention of criminal proceeds, denuding offenders of the economic benefits that may have been derived or obtained by the commission of scheduled offenses and thus become an iteration of the legislative policy that crime would not pay. PMLA seeks to adopt, enforce and unleash punitive measures against the commission of crime and the retention of ill-gotten gains.*
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> *81. The Government when it seeks to initiate pre-emptive measures which may ultimately lead to a civil forfeiture and confiscation of tainted assets is neither seeking to enforce a debt nor is it proceeding towards appropriation of moneys due or*

payable to it. Those proceedings are not liable to be viewed as an action to recover a tax or moneys owed to the Government. That action is fundamentally aimed at an ultimate confiscation of properties and assets which would have been obtained by a person by commission of a crime and thus deriving a benefit which was otherwise if not impermissible, forbidden by law. Assets which may have been obtained by the commission of a scheduled offense thus cannot be accorded exemption or immunity from the rigours of the PMLA. Acceptance of such a contention would not only run contrary to the legislative policy but also undermine the efforts of the legislature to combat the offense of money laundering. In fact if Section 14 were to be interpreted in the manner as suggested by the petitioner, it would deprive the authorities charged with implementing the provisions of the PMLA of an essential weapon in their quest to confiscate proceeds of crime. It would be pertinent to note that the activity of money laundering is itself aimed at obfuscating the origins of property illegally derived from crime. It is a process which inherently entails the layering of proceeds which itself is a dynamic process. The power of attachment is thus an essential tool which is designed to ensure that the tainted asset is not transferred or alienated further and beyond the reach of the authorities itself.

82. The Court finds itself unable to accept the submission that the provisions of the PMLA are liable to be read as being subservient to the moratorium provision comprised in Section 14 of the IBC for the following additional reasons. PMLA seeks to subserve a larger public policy imperative. The enactment represents a larger public interest, namely the fight against crime and the debilitating impact that such activities ultimately have on the society and the economy of nations as a whole. Tainted assets are those which would have been obtained through surreptitious means and modes, through layered transactions aimed at obfuscating their origins. The legislation aims at denuding the perpetrators of crime of gains obtained from such activities. It is a reparation measure which seeks to strip and deprive criminals of benefits derived and retained by the adoption of illegal and dishonest action. The PMLA is an enactment which is aimed at affecting the disgorgement of illegal gains. The Court deems it apposite to note that the Insolvency Law Committee Report, 2016 had pertinently observed in Para 8.11 that the moratorium provision is not liable to be interpreted as barring all possible actions "especially where countervailing public policy concerns are involved". It also took note of laws prevailing in different jurisdictions which permit regulatory actions which though not aimed at collecting moneys for the estate protect other vital and urgent public interests. This view finds reiteration in the UNCITRAL Legislative Guide on Insolvency Law which had recognized "actions to protect public policy concerns" falling outside the ken of a moratorium.

83. Viewed in that light, it cannot possibly be said that actions taken under that statute are akin or similar to steps that may be taken by a creditor pursuing an ordinary monetary claim. The tainted property is not a debt owed to the Government. It is not something which is owed to the Government or a liability which is liable to be discharged or liquidated. On an overall conspectus of the aforesaid, the Court is of the considered opinion that on a fundamental plane, it would be incorrect to read Section 14 as completely shutting out actions under Sections 5 and 8 of the PMLA.

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92. This Court while dealing with the scope of the two enactments has in ***Nitin Jain Liquidator of PSL Limited vs. Enforcement Directorate*** *reported in 2021 SCC OnLine Del 5281 as under: -*

> *"85. As would be evident upon a consideration of the decisions aforenoted, the IBC is primarily concerned with the subject of restructuring of indebted corporate debtors, adoption of means for their revival, securing the interests of creditors and for adoption of steps for effective and timely resolution of corporate insolvency. The PMLA, on the other hand, is a statute fundamentally concerned with trying offenses relating to money laundering, following the proceeds of crime and for confiscation of properties obtained in the course of commission of those offenses or connected therewith. It sets up an investigative and adjudicatory mechanism in respect of offenses committed, attachment of tainted properties and other related matters. It sets up Special Courts for trial of offenses and to bring the guilty to book.*
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> *86. Viewed in that backdrop, it is evident that the two statutes essentially operate over distinct subjects and subserve separate legislative aims and policies. While the authorities under the IBC are concerned with timely resolution of debts of a corporate debtor, those under the PMLA are concerned with the criminality attached to the offense of money laundering and to move towards confiscation of properties that may be acquired by commission of offenses specified therein. The authorities under the aforementioned two statutes consequently must be accorded adequate and sufficient leeway to discharge their obligations and duties within the demarcated spheres of the two statutes.*
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> *87. In a case where in exercise of their respective powers a conflict does arise, it is for the Courts to discern the legislative scheme and to undertake an exercise of reconciliation enabling the authorities to discharge their obligations to the extent that the same does not impinge or encroach upon a facet which stands reserved and legislatively mandated to be exclusively controlled and governed by one of the competing statutes. The aspect of legislative fields of IBC and PMLA and*

the imperative to strike a correct balance was rightly noticed and answered by the learned Judge in Axis Bank."

93. On a consideration of the precedents which have come to be rendered on the aforesaid subject, this Court finds that both NCLT and NCLAT, have correctly taken the view that the moratorium would not prevent the authorities under the PMLA from exercising the powers conferred by Sections 5 and 8 notwithstanding the pendency of the CIRP. The view as taken and expressed in the decisions aforenoted clearly commends acceptance and reiteration for the reasons assigned in those decisions as well as those noted by this Court in paragraphs 78-83 of this decision."

In the light of the judgment in the case supra, first issue raised by the appellant in reference of Section 14 of IBC is not made out.

The Ld. Counsel for the appellant has made a reference to Section 32A of IBC, 2016. It is to stress that once CIRP proceedings are initiated, all other proceedings ceased to commence for any liability of corporate debtor for the offence committed prior to commencement of the Corporate Insolvency Resolution process. The CIRP was initiated prior to the attachment and thus by the operation of Section 32A of the IBC 2016, the impugned order deserves to be set aside.

To appreciate the arguments of the Counsel for the appellant, it would be gainful to refer Section 32A of the IBC, 2016 which is quoted thus-

***"32A. Liability for prior offences, etc.**--(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the*

liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not--

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a designated partner as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an officer who is in default, as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not--

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation.--For the purposes of this sub-section, it is hereby clarified that,--

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

The perusal of the provision quoted above reveals *non-obstante* clause to give overriding effect to the provision. Sub-Section (1)to Section 32A provides that liability of a corporate debtor for an offence committed prior to the commencement of Corporate Insolvency Resolution Process shall cease and the corporate debtor shall not be prosecuted for such an offence

from the date of Resolution Plan is approved by the Adjudicating Authority under Section 31 if the resolution plan results in change in the management or control of the corporate debtors to other persons which has been narrated in sub-section(1) of Section 32A.

Sub-section(2) of Section 32A, however, providesthat no action shall be taken against the property of corporate debtor in relation to an offence committed prior to commencement of CIRP where such property is covered under a Resolution Plan approved by the Adjudicating Authority under Section 31 which results in the change of control of the corporate debtor. Sub-Section(2) of Section 31 pre-supposes approval of Resolution Plan to impose a bar for the action against the property of the corporate debtor. In the instant case, the appellant has not submitted approval of the Resolution Plan under Section 31 of IBC, 2016. The explanation appended below sub-section(2) to Section 32A of IBC covers even the attachment, seizure etc. under any law which may be applicable to the corporate debtor. Thus an action of attachment is barred, if Resolution Plan is approved under Section 31 of the IBC. In the instant case, the appellant has failed to place on record approval of the Resolution Plan rather it seems they have guided themselves by sub-section 1 of Section 32A ignoring that action against the propertyhas been

prohibited under sub-section 2 of Section 32A and not under Section 32A(1), if the Resolution Plan is approved under Section 31 of the IBC.

Here we may add that even sub-section (2) of Section 32A of IBC would beapplicable subject to various conditions given under clauses (i) & (ii) to Section 32A(2) of IBC. Section 32A(2) of IBC requires approval of resolution plan to result in the change in control of the corporate debtor to a person, or sale of liquidation assets under provisions of Chapter III of Part II of the Code to a person who was not (i) a promoter or in the management or control of the corporate debtor or a related party of such a person or (ii) a person with whom the relevant investigating authority has on the basis of material in their possession reason to believe that he had abetted or conspired for the commission of offence and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

To apply section 32A(2) of IBC, the necessity is not only of the approval of resolution plan under section 31 but requires even other condition to be satisfied, as indicated above. The fact available on record does not refers to satisfy any of the conditions given under clause (i) & (ii) to sub-section (2) of Section 32A of the IBC. We find invariably an

application for release of property in reference to section 32A(2) of the IBC is filed without pleading or placing material on record to satisfy the conditions given under clause (i) and (ii) to sub-section(2) of Section 32A of IBC. The approval of the resolution plan should result in the change in control of the corporate debtor to a person who was not a promoter in management and control of corporate debtor or related party and a person with whom the relevant investigating authority has on the basis of material in their possession reason to believe that he had abetted or conspired for the commission of offence and has submitted or filed a report or a complaint to the relevant statutory authority or Court. If the change results in control of the corporate debtor to a related party, then even approval of resolution plan under section 31 of IBC would not allow attachment of the property. We find no pleading or material to satisfy conditions given under clause (i) and (ii) to sub-section (2) of 32A of IBC to seek release of the property. Thus, for these reasons, we find that without making out a case under Section 32A of the IBC,a challenge is made to the attachment.

In the light of aforesaid and in the absence of approval of the Resolution Plan, the arguments raised by the appellant cannot be accepted.

The Counsel for the appellant made a reference to the judgment of Bombay High Court in the case of ***Shiv Charanversus Adjudicating Authority*** in Writ Petition No. 9993 of 2023. It was submitted that in the judgment supra, it was held that section 32A(2) give immunity even without a successful Resolution having been approved. We have gone through the judgment. Sub-section 2 of Section 32A of IBC would apply and bar an action against the property of the corporate debtor in relation to the offence committed prior to commencement of CIRPif a property is covered by the Resolution Plan and has been approved by the Adjudicating Authority under Section 31 of IBC, 2016. The approval of the plan under Section 31 of IBC, 2016 is a pre-condition to apply Section 32A(2) of IBC. An embargo on attachment under sub-section (2) of Section 32 would not apply till resolution plan is approved and that too if a property is covered therein. We are unable to take a view going contrary to the statute which has already been upheld by the Hon'ble Supreme Court holding it to be constitutionally valid. Accordingly, we are unable to take a view favourable to the appellant in the absence of approved Resolution Plan.

It would be casualty of law if we go against Section 32A(2) of IBC. The direction cannot be given contrary to the statute. Therefore, even the second argument raised by the appellant

cannot be accepted. Mere initiation of CIRP does not debar to the proceedings under the Act of 2002 in reference to sub-section(2) of Section 32A rather it would be when Resolution Plan is approved covering the property under attachment and on satisfaction of other conditions. Sub-Section(1) to Section 32A of the IBC operates towards the liability of corporate debtor for an offence committed prior to commencement of Corporate Insolvency Resolution Process (CIRP) which would cease and accordingly the corporate debtormay not be prosecuted for such an offence from the date Resolution Plan is approved under Section 31 of the IBC. Sub-section(1) of Section 32A does not talk about action against the property of the corporate debtor rather it is towards the liability out of the offence committed and as a consequence a prosecution. The appellant could not make difference between the two sub-sections while arguing the appeal. The corporate debtormay not be prosecuted for such offence from the date the Resolution Plan has been approved under section 31 of the IBC 2016. Sub-section(1) to Section 32A does not refer to the property. Section 32A(1) does not talks about attachment of the properties, thus we are unable to accept even second argument of the appellant.

The Counsel for the appellantsubmitted that the properties under attachment were mortgaged by Mr. Sunil K.

Kakkadand his companies and were not involved in commission of offence being the mortgaged even prior to the registration of the FIRs. According to the appellant, there was no nexus between the mortgaged property and commission of crime. In the absence of the nexus between the two,the properties mortgaged with the Financial Institutions could not have been attached. A reference to the judgement of the Apex Court in ***PavanaDibur Vs. Deputy Director, Directorate of Enforcement,***reported in 2023 SCC OnLine SC 1586has been given.

This Tribunal has taken a view on the issue in the case of FPA-PMLA-5612/BBS/2023 ***Shri SadanandaNayak vs. The Deputy Director Directorate of Enforcement, Bhubaneswar***dated 14th October 2024 where the judgement in the case of **PavanaDibur(supra)** was also considered. The relevant paras of the said judgment are quoted hereunder:

> *"19. The reference to the judgment in the case of PavanaDibur (supra) has been given where the Ld. Counsel for the parties did not refer Para 68 of the judgment in the case of Vijay MadanlalChoudhary (supra) decided by three judges of the Apex Court. In fact, elaborate arguments to define "proceeds of crime" on the issue were not raised by the parties after referring to the object of the Act of 2002 which was enacted out of the international convention. The Delhi High Court has discussed the issue elaborately and otherwise if we apply the judgement of Kerala High Court in the case of Satish MotilalBidri (supra,) it would be making the second limb of the definition of "proceeds of crime" to be redundant. The counsel who appeared before the Kerala High Court did not argue that the definition of "proceeds of crime" has three limbs and unfortunately the view expressed by Delhi High Court in Axis Bank (supra) was not discussed elaborately while it was cited by the counsel.*

20. The Ld. Single judge of Kerala High Court did not subscribe the judgment aforesaid, rather applied the judgment of Punjab and Haryana High Court in the case of ***Seema Garg Vs. Deputy Director, Directorate of Enforcement*** *, reported in 2020 SCC OnLine Punjab & Haryana 738. With due respect, we are unable to apply the judgment of Kerala High Court going against Para 68 of the judgment of the Apex Court in the case of* ***Vijay MadanlalChoudhary*** *(supra). The judgment of* ***Seema Garg*** *(Supra) has been dealt with by the Delhi High Court in the case of* ***Prakash Industries Ltd. v. Directorate of Enforcement*** *reported in 2022 SCC OnLine Del 2087. The relevant paras are quoted hereunder:*

> *"76. Seema Garg principally holds that the phrase value of any such property and property equivalent in value held within the country or abroad cannot be ascribed the same meaning and effect. The learned Judges comprising the Division Bench then proceeded to hold that even if the intent of the legislature was to include any property in the hands of a person within the ambit of the expression proceeds of crime‖, there would be no need to create three limbs of definition of proceeds of crime.*
>
> *xx xx xx xx xx xx xx xx xx xx*
>
> *79. Regard must also be had to the fact that the legislation itself is dealing with contingencies where proceeds of crime are layered and their origins camouflaged and masked enabling the accused to project or claim it to be untainted property. The Act clearly as does Axis Bank take into consideration a situation where a person who has obtained proceeds of crime by commission of a scheduled offence has managed to ensure that a property directly or indirectly connected to criminal activity is rendered untraceable. It is to confer authority upon the Directorate to proceed further in such a situation that Section 2(1)(u) uses the expression or the value of any such property. The safeguard which stands constructed in Section 2(1)(u) in such a contingency is that in case the Directorate does proceed against any other property, it must be equivalent in value to the illegal pecuniary benefit or gain that may have been obtained as a result of criminal activity.*
>
> *80. In the considered opinion of this Court to tie the Directorate's power to move forward in this direction*

only in cases where property is taken or held outside the country would not only do violence to the plain language of Section 2(1)(u), it would clearly whittle down the scope and intent of the definition itself. It would essentially amount to erasing the expression value of any such property as appearing in Section 2(1)(u) altogether. The Court further notes that in Seema Garg the learned Judges themselves observed that the phrase value of any such property would not mean and include any property which has no link, direct or indirect, with property derived or obtained from commission of a scheduled offence. The Court observes that Section 2(1)(u) clearly and in unambiguous terms includes not only property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence but also the value of any such property. Seema Garg thus seems to gloss over the statutory imperatives underlying the deployment of the phrase —or the value of any such property and the concept of deemed tainted properties enunciated in Axis Bank. On a plain textual interpretation of Section 2(1)(u) as well as in the backdrop of the amendatory history of that provision, this Court finds itself unable to agree with the line of reasoning adopted in Seema Garg. As held hereinbefore, affirmation of Seema Garg would amount to virtually deleting the phrase —or the value of any such property from Section 2(1)(u). That would not only violate the well settled tenets of statutory construction but would clearly amount to the Court rewriting the provision itself in a manner that it stands deprived of vital and purposive content. The Court further notes that Axis Bank had enunciated important safeguards which would apply in respect of third-party interests in deemed tainted property. Those caveats duly secure and protect bona fide third-party interests created for valid consideration. This Court, thus, reaffirms those defences as were culled out in Axis Bank. The Court thus reiterates the interpretation accorded to Section 2(1)(u) by this Court in the aforesaid decision. Consequently, and for all the aforesaid reasons this Court finds itself unable to agree with the principles as laid down in Seema Garg as well as the subsequent decisions rendered by the Andhra Pradesh High Court in Kumar Pappu Singh Vs. Union of India and the Patna High Court in HDFC Bank Limited Vs Government of India, Ministry of Finance.

81. The Court also takes note of the position that although SLP (Crl) No. 28906/2019 is pending before the Supreme Court against the decision rendered in Axis Bank, the judgement of this Court has not been stayed or placed in abeyance. The interim order of 30 August

2019 passed in the aforesaid Special Leave Petition only requires parties to maintain status quo. Insofar as the judgement of the Punjab and Haryana High Court in Seema Garg is concerned, although SLP (C) No.14713 14715/2020 preferred against the same came to be dismissed, while doing so the Supreme Court recorded that the petition was being rejected in the peculiar facts and circumstances of the case. The dismissal of the aforesaid Special Leave Petition cannot in any case be interpreted or understood as being an affirmation of the view as expressed by the Punjab and Haryana High Court.

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105. It would be pertinent to recall that properties which were acquired prior to the enforcement of the Act may not be completely immune from action under the Act in light of what this Court had held in Axis Bank. As was explained by the Court in Axis Bank, the expression proceeds of crime envisage both ―tainted property as well as ―untainted property with it being permissible to proceed against the latter provided it is being attached as equal to the "value of any such property" or "property equivalent in value held within the country or abroad". However, both the italicised categories would be liable to be invoked in cases where the actual tainted property cannot be traced or found out. It is only where the respondents are unable to discover the tainted property that they can take the statutory recourse to move against properties which may fall within the ambit of ―value of any such property or ―property equivalent in value held within the country or abroad. To the aforesaid limited extent, properties purchased prior to 01 July 2005 may also become vulnerable and subject to action under the Act. However, enforcement action against such properties would have to satisfy the tests and safeguards as propounded in Axis Bank with the learned Judge observing that in such a situation it would have to be established that the person accused of money laundering had an interest in such property at least till the time that he indulged in the proscribed criminal activity. The learned Judge further observed that bona fide rights acquired by third parties prior to the commission of the predicate offense would stand saved."

21. The issue aforesaid was not raised in the case of ***PavanaDibur*** *(supra). The counsel appeared therein did not*

elaborately argue the issue by referring to the definition of "proceeds of crime" having three limbs to give meaning to each limb for the interpretation of the definition of the "proceeds of crime". The reference of Para 68 of the judgment of three judges Bench of the Apex Court in the case of ***Vijay MadanlalChoudhary*** *(supra) was not cited and thus counsel for the respondent submitted that the judgment in the case of* ***PavanaDibur*** *(supra) does not propound ratio on definition of "proceeds of crime" and, therefore, direction for the property acquired prior to commission crime is to be taken on facts of that case.*

22. It has already been clarified by us that if the definition of "proceeds of crime" is given interpretation by dividing it into two parts or by taking only two limbs, then it would be easy for the accused to siphon off or vanish the proceeds immediately after the commission of scheduled offence and in that case none of his properties could be attached to secure the interest of the victim till conclusion of the trial. This would not only frustrate the object of the Act of 2002, but would advance the cause of the accused to promote the crime of money laundering. The Judgment in the case of ***Vijay Madanlal Chaudhary*** *(supra) is of three judges bench while the judgment in the case of* ***PavanaDibur*** *(supra) is of two judges bench."*

A perusal of the paras quoted above reveals that the property acquired prior to commencement of crime can also be attached if the proceeds of crime has been vanished or siphoned off and is not available for attachment.

This case has peculiarity because the appellant's bank has lodged the FIR against Shri Sunil S. Kakkad and his entities for wrongful loss to State Bank of India. The amount quantifiedtherein is of Rs. 377.90 crores. The attachment of the property is to protect the financial institutions who lodged the FIR so that in case accused is convicted, they can seek release of the property under section 8(8) of the Act of 2002.

Mere confirmation of the attachment of the property by the Adjudicating Authority and even dismissal of appeal by this Tribunal does not create a bar on the financial institutions to seek release of the properties by invoking section 8(6) to 8(8) of the Act of 2002. They would rather be entitled to seek release of the properties from the Special Judge even during the trial which would be after hearing the interested parties. If we release the properties in favour of the institutions without analyzing a contest in the hand of the mortgagor of the property, it would be against the principle of natural justice and for that reason we may refer the judgment of this Tribunal in the case of FPA-PMLA-3223/MUM/2019***JM Financial Asset Reconstruction Company Ltd. vs. The Deputy Director, Directorate of Enforcement, Mumbai &Anr.***dated 26th April 2024which clarified the right of the financial institutions. It has very well protected even under the Act of 2002. The relevant paras of the said judgement ***JM Financial Asset Reconstruction Company Ltd.*** (supra) are quoted hereunder:

> *"21. We have already recorded finding that the attachment of the property does not effect or transfer the title unless the property is confiscated and it can be when the accused is convicted. The settlement of the property, if confiscated is provided under section 8 (8) of the Act of 2002. If the prayer of the financial institution for protection of their right and for that to lift the attachment or quash it is accepted that it may be in ignorance of section 8 (8) of the Act of 2002.*

22. It may be that mortgage of the property is to secure the loan amount, but there may be cases where the property so mortgaged was acquired out of the proceeds of crime. The observation aforesaid has been made because we have come across the cases where an accused mortgaged the property to a bank and acquired the loan amount and subsequently committed default in making the payment. When the bank pursued the matter for recovery of the amount and for that even to auction the property by invoking the SARFAESI Act, 2002, it was found that the same property was earlier mortgaged to another bank and therein also the same accused committed default in making the payment. In fact, subsequent loan with mortgage of property was by creation of forged documents. In that case, claim for the property was made by two different financial institutions based on the mortgage of the property with them to secure the loan. If it is interfered at the instance of one financial institution leaving the other, it would be nothing but to affect the rights of other institution.

23. To save the situation aforesaid, the safeguard is available under section 8 (8) of the Act of 2002 on the confiscation of the property. The property would be settled in favour of the rightful claimant in case of claim by two financial institutions. The Special Court and Central Government can take appropriate decision to secure both the financial institution appropriately and proportionately.
24. The above illustration has been given only to show significance and relevance of section 8 (8). It was brought by the legislature for the purpose sought to be achieved.

25. In the light of the aforesaid, the interference in the order of the attachment order, on a challenge by the financial institution, should not be persuaded by the sentiments and only on the ground that once there is a mortgage of the property, it should go to the financial institution.

26. In case, it is taken up on the sentiments of the institution, it may result in anarchy and explained further by following illustration:- If property is proceeds of crime or attached for the value thereof but was under mortgage with the financial institution and thereby to be released addressing the interests of the financial institution leaving and even affecting the claim of the victim who lodged the criminal case against the accused. In case of release of the property from attachment at the instance of financial institution, it can be auctioned where it may achieve the amount greater than what is due to the financial institution. In that case, the financial institution can retain the amount

to the extent it is due to them and remaining has to be given to the person who mortgaged the property which would be none but can be the accused and thereby the accused would be benefited on release of the property in a given case by getting the amount over and above secured, out of the auction to settle the dues of financial institutions. In that case again victim would suffer whereas if the mechanism given under section 8 (8) is applied, safeguard would exist to settle the amount in favour of the rightful claimant".

It is otherwise a fact in the CIRP, bank may agree for lesser amount than due and it would be finalized with the approval of the plan.

At this stage we may further deal with the another argument raised by the appellant in reference to the SARFAESI Act of 2002 to hold that the aforesaid Act has precedence over the PMLA 2002 because the amendment in the Act by SARFAESI Act 2002 was made w.e.f. 01.09.2016 by the amending Act 2016 which provide overriding effect to other provisions. For reference, amending provisions pursuant to the amending Act of 2016 is quoted hereunder:

26E. Priority to secured creditors.—Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

Explanation.—For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.]

A perusal of the provision quoted above does not provide an overriding effect to all the statutes rather it is limited in operation. The provision does not refer to and bar action under the Act of 2002. The non-obstante clause otherwise apply when there is conflict between two provisions and not otherwise. The amending Act 2016 does not affect the proceedings under the Act of 2002. Thus, we do not find any substance in the argument in reference to it also. In the light of discussions made above, we do not find any reason to cause interference in the order. They are accordingly dismissed.

It is, however, made clear that the dismissal of appeals would not affect the appellants' financial institutions to seek release of the properties by invoking section 8(6) and 8(8) of the Act of 2002 rather for that this order would not come their way. The detailed discussion to protect the right of the financial institution has been given in the case of ***JM Financial Asset Reconstruction Company Ltd.*** (supra) which would apply to this case also.

With the aforesaid all the appeals are disposed of.

(Justice MunishwarNath Bhandari)
Chairman

(Rajesh Malhotra)
Member

NEW DELHI
06TH MARCH, 2025
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